Cement Masons' Local Union No. 502 Operative Plasterers' and Cement Masons' International Association of the United States and Canada *and* Elliot Construction Corporation and Chicago and Northeast Illinois District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL–CIO. Case 13–CD–599

April 4, 2001

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND WALSH

The charge in this Section 10(k) proceeding was filed on December 29, 2000, by the Employer, Elliot Construction Corporation (Elliot Construction or Employer), alleging that the Respondent, Cement Masons' Local Union No. 502 Operative Plasterers' and Cement Masons' International Association of the United States and Canada (Cement Masons), violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by Chicago and Northeast Illinois District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL–CIO (Carpenters). The hearing was held on January 17, 2001, before Hearing Officer Cathy Brodsky.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The Employer, an Illinois corporation with its principal place of business located in Glen Ellyn, Illinois, is engaged in the business of concrete construction. It annually has gross revenues in excess of $50,000 from its performance of services to public utilities, transit systems, newspapers, healthcare institutions, broadcasting stations, commercial buildings, educational institutions, and/or retail concerns. The parties stipulate, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act. We further find, based on the stipulation of the parties, that the Cement Masons and the Carpenters are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of Dispute

Elliot Construction has been engaged in the business of concrete construction for residential, commercial, and industrial construction projects for the past 47 years. Elliot Construction has collective-bargaining agreements with both Unions.

Elliot Construction was hired as a cement subcontractor to perform several concrete construction projects on a jobsite at Harper College in Palatine, Illinois, and began work on the project in July 2000.[1] Elliot Construction began performing the disputed work, forming concrete stairs and risers, in October.[2] Elliot Construction assigned the disputed work to employees represented by the Cement Masons as it had done for the past 47 years.

In a telephone call in early November, the Carpenters advised the Employer that the Harper College form work should be reassigned to employees the Carpenters represented. This demand was reiterated in a December 14 letter that further stated that if the Employer failed to reassign the work, then the Carpenters' members should be paid in lieu of the form work not reassigned. On December 21, the Cement Masons informed the Employer by letter that if Elliot Construction reassigned the work as the Carpenters demanded, the Cement Masons would strike and picket in order to maintain the work originally assigned to it.

This charge followed and a 10(k) hearing was conducted. Neither Union has disclaimed interest in the work.

B. The Work in Dispute

The work in dispute is forming concrete stairs and risers on a jobsite located at Harper College, 1200 W. Algonquin Road, Palatine, Illinois.[3]

C. Contentions of the Parties

The Employer and Cement Masons contend that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the work in dispute should be awarded to employees represented by the Cement Masons based on the Employer's collective-bargaining agreement with the Cement Masons, the Employer's preference, past practice, area practice, relative skills, and the economy and efficiency of operations. The Carpenters contend that there is no jurisdictional dispute here because the Carpenters did not make a demand for the work and consequently there are not competing claims for the disputed work. The Carpenters contend

[1] All dates hereafter are in 2000, unless otherwise noted.

[2] Forming stairs and risers involves setting a piece of wood, known as a board, riser, or screed, to the desired shape. After this is completed, concrete is poured. The wood is removed as the concrete hardens. The disputed work concerns only forming.

[3] The Employer and the Cement Masons stipulated to this description of the work in dispute. Although the Carpenters did not join this stipulation, it is clear from the record that the work in dispute is the forming of concrete stairs and risers.

that it is requesting that wages be paid to its members if the Employer utilizes noncarpenters to perform carpenter jurisdictional "form work." The Carpenters also assert that there is an agreed-upon method for the voluntary resolution of this dispute. The Carpenters accordingly have moved that the Board quash the notice of hearing.

D. Applicability of the Statute

Before the Board may proceed with determining a dispute pursuant to Section 10(k) of the Act, two jurisdictional prerequisites must be met. First, the Board must find reasonable cause to believe that Section 8(b)(4)(D) of the Act has been violated. This requires a finding that there are competing claims to the disputed work between rival groups of employees and that there is reasonable cause to believe that a party has used proscribed means to enforce its claim. Second, the Board must find that no method for the voluntary adjustment of the dispute has been agreed on.

In November, and again in December, the Carpenters demanded that the Harper College form work, which the Employer had assigned to employees the Cement Masons represent, be reassigned to employees it represents. The record further establishes that the Cement Masons threatened the Employer with a strike and picketing if the form work was assigned to employees represented by the Carpenters. Clearly, there are competing claims for the disputed work between rival groups of employees[4] and there is reasonable cause to believe the Cement Masons threatened to use proscribed means to enforce its claim if the work was reassigned.

The Employer and the Cement Masons stipulated that there is no agreed-upon method to adjust the dispute voluntarily. Although the Carpenters claimed that such a method exists, the Carpenters pointed to no evidence that all parties are bound by a single mechanism for adjusting the dispute.

We find reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there exists no agreed-upon method for voluntary adjustment of the dispute to which all parties are bound within the meaning of Section 10(k) of the Act. Accordingly, we deny the Carpenters' motion to quash the notice of hearing and find that the dispute is properly before the Board for determination.

E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. See *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. See *Machinists Lodge 1743 (J.A. Jones Construction)*, 135 NLRB 1402, 1410–1411 (1962).

The following factors are relevant in making the determination of this dispute.[5]

1. Certifications and collective-bargaining agreements

The parties stipulated there are no Board certifications concerning the employees involved in this dispute.

The Employer is bound by collective-bargaining agreements with both the Cement Masons and with the Carpenters. Section 6A, paragraph 1 of the agreement between the Employer and the Cement Masons provides that "the setting of all strips, screeds, and bulkheads when set to grade and used as a screed" shall be performed by cement masons under this agreement. Patrick Rizio, a Cement Masons' business agent, testified that a screed is another term for the form boards that are at issue in this dispute. Although the Carpenters claimed its contract with the Employer covered the disputed work, the Carpenters did not specify the language on which it relied. Article 1 of its contract states that the Carpenters' occupational jurisdiction is "the milling, fashioning, joining, assembling, erection, fastening or dismantling of all material of wood, plastic, metal, fiber, cork, and composition, and all other substitute materials."

We find that section 6A of the agreement between the Employer and the Cement Masons, particularly in light of Rizio's uncontradicted testimony, more specifically pertains to the work in dispute. See *Steelworkers Local 392 (BP Minerals)*, 293 NLRB 913, 914–915 (1989). The factor of collective-bargaining agreements accordingly favors an award of the disputed work to employees represented by the Cement Masons.

2. Employer preference and past practice

The Employer assigned the disputed work to employees represented by the Cement Masons and prefers that the work in dispute continue to be performed by employees represented by the Cement Masons.

Robert Elliot, president and owner of the Employer, testified that for the past 47 years Elliot Construction has consistently assigned the type of work in dispute to the employees represented by the Cement Masons. He further testified that Elliot Construction has never assigned this type of work to employees represented by the Carpenters. We accordingly find that this factor favors an

[4] We find no merit to the Carpenters' contention that its December 14 letter was not a demand for the disputed work to be reassigned to employees it represents.

[5] The Carpenters called no witnesses during the hearing.

award of the disputed work to employees represented by the Cement Masons.

3. Area and industry practice

Elliot testified that in his more than 40 years of experience the forming of concrete risers and stairs has always been performed by cement masons. Further, Elliot testified that on the Harper College job and on the hundreds of other similar jobs completed by Elliot Construction in the area he has assigned such work to cement masons. Rizio similarly testified that based on his 30 years of experience the forming of concrete risers and stairs has traditionally been the work of cement masons. He further stated that other employers in the area likewise assign such work to cement masons. The Carpenters did not submit any evidence to the contrary. We accordingly find that the factor of area practice[6] favors awarding the work in dispute to the employees represented by the Cement Masons.

4. Relative skills

Elliot testified that employees represented by the Cement Masons possess the requisite skill and ability to perform the disputed work. Rizio testified that cement masons undergo apprenticeship programs designed to train them to recognize the appropriate time to remove the screeds after the concrete has been poured, so as not to spoil the concrete, and to be familiar with the steps and layout involved in the forming and pouring process. The Carpenters did not submit any evidence concerning the skills of Carpenters-represented employees. Based on the evidence submitted by the Employer and Cement Masons, we find that this factor favors awarding the disputed work to employees represented by the Cement Masons.

[6] The parties did not present any evidence regarding industry practice.

5. Economy and efficiency of operations

Elliot testified that it is more economical to assign the disputed work to cement masons, who perform pouring work as well as the disputed forming work. To assign employees represented by the Carpenters to perform the disputed work would require operating with two crews, and carpenters would be idle when cement masons were pouring. Clearly, it is more efficient to assign the disputed work to employees who can perform both forming and pouring. Accordingly, we find that this factor favors awarding the work in dispute to employees represented by the Cement Masons.

CONCLUSIONS

After considering all the relevant factors, we conclude that the Employer's employees represented by the Cement Masons are entitled to perform the work in dispute. We reach this conclusion relying on the factors of collective-bargaining agreement, employer preference and past practice, area practice, relative skills, and economy and efficiency of operations. In making this determination, we are awarding the disputed work to employees represented by Cement Masons' Local Union No. 502 Operative Plasterers' and Cement Masons' International Association of the United States and Canada, not to that Union or to its members. This determination is limited to the controversy that gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

Employees of Elliot Construction Corporation, represented by Cement Masons' Local Union No. 502 Operative Plasterers' and Cement Masons' International Association of the United States and Canada are entitled to perform the work of forming concrete stairs and risers on a jobsite located at Harper College, 1200 W. Algonquin Road, Palatine, Illinois.